84-537

Office - Supreme Court, U.S.
FILED
OCT 1 1984
ALEXANDER L. STEVAS,
CLERK

No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

GEORGE E. AUSTIN,

Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

STANFORD SHMUKLER, *Esquire*
24th Floor, Packard Building
15th and Chestnut Streets
Philadelphia, Pa. 19102
(215) 751-9500

Counsel for Petitioner
George E. Austin

PACKARD PRESS / LEGAL DIVISION, 10th & SPRING GARDEN STREETS, PHILA., PA. 19123 (215) 236-2000

33 pp

QUESTION PRESENTED

In Determining Whether Court-appointed Counsel was Constitutionally Effective, did the Standards Utilized by the Pennsylvania Courts Meet the Constitutional Requirements Later Enunciated by this Court in *Strickland v. Washington* and *United States v. Cronic*?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iii
PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA	1
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISION INVOLVED	2
STATEMENT OF THE CASE	3
REASON FOR GRANTING THE WRIT	5
The Pennsylvania Courts Did Not Follow The Standards Established By This Court in Determining Effectiveness of Counsel	5
CONCLUSION	12
APPENDIX A: ORDER OF THE SUPREME COURT OF PENNSYLVANIA	A1
APPENDIX B: JUDGMENT AND OPINION OF SUPERIOR COURT OF PENNSYLVANIA	A2
APPENDIX C: OPINION OF TRIAL JUDGE DATED OCTOBER 1, 1982	A8
APPENDIX D: SUPPLEMENTAL OPINION OF TRIAL JUDGE DATED OCTOBER 6, 1982	A13
APPENDIX E: ORDER BY JUSTICE BRENNAN EXTENDING TIME FOR FILING PETITION FOR WRIT OF CERTIORARI	A-16

TABLE OF AUTHORITIES

Cases:	Page
Commonwealth v. Bailey, 480 Pa. 329, 309 A.2d 166 (1978)	10
Commonwealth v. Carter, 219 Pa. Super. 280, 281 A.2d 75 (1971)	11
Commonwealth v. Davenport, 494 Pa. 532, 431 A.2d 982 (1981)	10
Commonwealth v. Evans, 465 Pa. 12, 348 A.2d 92 (1975)	11
Commonwealth v. LeCuyer, 290 Pa. Super. 518, 434 Pa. 1264 (1981)	11
Commonwealth v. McMonigle, 228 Pa. Super. 345, 323 A.2d 733 (1974)	11
Commonwealth v. Mobley, 467 Pa. 460, 359 A.2d 367 (1976)	9
Commonwealth v. Smith, 263 Pa. Super. 94, 397 A.2d 12 (1979)	11
Commonwealth v. Vaughn, 459 Pa. 35, 326 A.2d 393 (1974)	9
Commonwealth v. Wharton, 250 Pa. Super. 25, 378 A.2d 434 (1977)	11
Commonwealth v. Wilson, 449 Pa. 235, 296 A.2d 719 (1972)	9
Strickland v. Washington, 80 L.ed.2d 674 (May 14, 1984)	5, 6, 7, 8, 11, 12
United States v. Cronic, 80 L.ed.2d 657 (May 14, 1984)	5, 8
CONSTITUTIONAL PROVISION:	
United States Constitution, Sixth Amendment	2, 5

TABLE OF AUTHORITIES *(Continued)*

Cases: Page

STATUTES AND RULES:

Pennsylvania Rules of Criminal Procedure, Rule 1123(a) 9

Pa. Crimes Code: 18 Pa.C.S.A. §308 10

28 U.S.C. §1257(3) 2

U.S. Supreme Court Rule 29.1 2

No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

GEORGE E. AUSTIN,

Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

George E. Austin, your Petitioner, respectfully prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Pennsylvania entered in the above entitled case on July 2, 1984.

OPINIONS BELOW

On July 2, 1984, the Supreme Court of Pennsylvania entered an Order denying Allocatur, refusing to review the judgment of the Superior Court of Pennsylvania. The Order of the Supreme Court of Pennsylvania is unreported, and is reproduced in Appendix A, *infra*, p. A1. A panel of the Superior Court of Pennsylvania had, on March 16, 1984, filed an Order and Memorandum Opinion affirming the judgment of conviction and sentence imposed in the trial court. The Opinion of the Su-

perior Court is also not officially reported, but is reproduced in Appendix B, *infra*, pp. A2-A7. The trial judge, Honorable Albert F. Sabo, of the Trial Division of the Court of Common Pleas of Philadelphia, had denied timely post-verdict motions for new trial and arrest of judgment on September 24, 1981, and had imposed consecutive sentences of five to ten years and life imprisonment. On October 1, 1982 Judge Sabo filed an Opinion setting forth the reasons for denying those motions, and on October 6, 1982 he filed a Supplemental Opinion setting forth his reasons for denying petitioner's motion in the nature of a post-conviction hearing application, which had been filed prior to the appeal being perfected, challenging the effectiveness of his trial counsel. Neither of those Opinions is officially reported, but they are reproduced respectively as Appendix C, *infra*, pp. A8-A12, and Appendix D, *infra*, pp. A13-A15.

JURISDICTION

The judgment of the Supreme Court of Pennsylvania (Appendix A, *infra*, page A1), refusing to review the Judgment of the Superior Court which affirmed the judgment of conviction and sentence of the Court of Common Pleas of Philadelphia County, was entered July 2, 1984. A timely petition for extension of time for filing this Petition for Writ of Certiorari was granted by Justice Brennan on August 27, 1984, granting an extension until September 30, 1984. A copy of Justice Brennan's Order is reproduced herein as Appendix E, *infra*, page A16. (Since September 30 is a Sunday, the due date is extended to October 1, 1984, under Rule 29.1.) This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution provides in pertinent part:

"In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."

STATEMENT OF THE CASE

The Petition before this Court seeks review of a decision affirming the conviction of first degree murder and of conspiracy, and the sentence imposed thereon.

At about 4:30 A.M. on September 26, 1980, Edward Tierney was present at 4105 Orchard Street in the City of Philadelphia. There was no evidence offered by the prosecution to explain why he was present at that address at that time.[1] The owner of the home, Theresa Nunez, and several other people were present in the home at that time. Several witnesses testified that three men viciously beat Tierney with kitchen instruments, including forks, knives, pots and pans. While he attempted to ward off his attack he unsuccessfully pleaded for others in the house to help him, explaining that he was a police officer. (At that point in time, he was a security guard, attending the Police Academy, but unable to complete the course because of a budget cut.)

Although at least some of the witnesses were unable to identify Petitioner as a participant in the attack, others did testify that he was one of the three individuals who participated in attacking the deceased.

At some point in time, the police were summoned by neighbors who heard a commotion at the residence. Mr. Tierney was dragged to the second floor, tied and placed in the bathtub, where the beating continued. When the police arrived, the owner, Miss Nunez, explained to the police that it was merely a domestic argument, whereupon the police left.

Shortly thereafter, three males (including Petitioner, according to some witnesses) dragged Mr. Tierney out to

1. Larry Cooper, who testified for Petitioner, stated that Tierney had come with him to the house for a homosexual liaison.

Mr. Tierney's car and struggled to place him into the trunk of the car. In an attempt to escape, Mr. Tierney continued to call out for help, but in vain. There was testimony that Petitioner struck Mr. Tierney in the head and body with a ball peen hammer, while others attempted to close the trunk with Mr. Tierney inside. Finally, those people jumped on top of the trunk and managed to close it.

One of the males drove Mr. Tierney's car away from the scene with Mr. Tierney, badly beaten, tied up, and still alive, in the trunk. That was the last time Mr. Tierney was seen alive. The next day his body was recovered from the Frankford Creek. A warrant was issued for Petitioner a few days later, but he was not arrested until almost six months later.

On August 7, 1981, a jury found Petitioner guilty of first degree murder and conspiracy to commit murder. Boilerplate post-trial motions were filed, but the trial court refused to grant additional time for the filing of additional reasons in support of those motions after the notes had been transcribed. Approximately one month thereafter, the Court heard argument and denied the post-verdict motions. Sentence was deferred pending appointment of new counsel, since Petitioner filed a *pro se* motion claiming ineffectiveness of prior court-appointed trial counsel. New counsel was appointed, and a hearing was held. At that hearing, trial counsel testified. At the conclusion of the hearing, the Court denied the motion, and immediately thereafter proceeded to sentence Petitioner to consecutive terms of imprisonment of not less than five or more than ten years for conspiracy, and life imprisonment on the First Degree Murder conviction. A timely appeal was filed.

A three judge panel of the Superior Court filed a Memorandum Opinion affirming the judgment of sentence. The Court noted that the post-conviction application was filed prematurely, since the Act requires that Petitioner must be sentenced to be eligible for relief. However, the

Court ignored this procedural defect and considered the claim of ineffective assistance of counsel on the merits, and rejected it. Appendix B, *infra*, p. A4 *et seq.*

A Petition for Allowance of Appeal was filed in the Supreme Court of Pennsylvania, but was thereafter denied. New counsel was retained, and this Petition has been filed.

REASONS FOR GRANTING THE WRIT

The Pennsylvania Courts Did Not Follow the Standards Established By This Court in Determining Effectiveness of Counsel.

When the Superior Court of Pennsylvania entered its Order in March, 1984, this court had not yet rendered its decisions in *Strickland v. Washington*, 80 L.ed.2d 674 (May 14, 1984), and *United States v. Cronic*, 80 L.ed.2d 657 (May 14, 1984). In those cases this Court set forth the definitive standards for establishing effectiveness of counsel. It is respectfully submitted that in the case at bar the conduct of trial counsel did not meet those standards, and both the trial judge and the Superior Court failed to apply the proper standards in testing the effectiveness of trial counsel under the Sixth Amendment.

In *Strickland*, the Court for the first time elaborated on the meaning of the Constitutional requirement of effective assistance in cases where there are claims of actual ineffectiveness, adversely affecting the lawyer's performance, rather than constructive ineffectiveness resulting from state interference or a conflict of interest. The Court noted that:

> "In giving meaning to the requirement, however, we must take its purpose — to ensure a fair trial — as a guide. The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversa-

rial process that the trial cannot be relied on as having produced a just result". 80 L.ed.2d, at 692-693.

The Court noted that this claim has two components: First, the defendant must show that counsel's performance was deficient, that he made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, defendant must show that the deficient performance prejudiced the defense. This requires a showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

The Court concluded that the proper standard for attorney performance is that of reasonably effective assistance. Although the Court refused to spell out more specific guidelines, it noted that representation of a criminal defendant entails certain basic duties, including a duty of loyalty, a duty to avoid conflicts of interest, an overarching duty to advocate the defendant's cause and the more particular duties to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution. Counsel also has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process. *Id.*, at 693.

The Court went on to note that an error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment if the error had no effect on the judgment. In certain Sixth Amendment contexts, prejudice is presumed, such as where there has been actual or constructive denial of the assistance of counsel altogether, or where there has been state interference with counsel's assistance. The Court concluded that the appropriate test for prejudice finds its roots in the test for materiality of exculpatory information not disclosed to the defense by the prosecution, and in the test for materiality of testimony made unavailable to the defense by government deportation of a witness. The defendant must show

that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.*, at 698.

In the case at bar, neither the trial court nor the intermediate appellate court (which, in this case, in effect rendered the final appellate state decision, since the Supreme Court refused to grant review of that the decision) applied any of those standards.

In the post-conviction proceedings, Petitioner complained that trial counsel had failed to meet with him in advance of trial sufficiently often to prepare the case; that trial counsel had failed to file supplementary reasons for post-trial motions after the Notes of Testimony were transcribed, thus preventing him from raising on appeal many significant trial issues; that he failed to interview the assistant medical examiner who had conducted the autopsy in order to raise questions as to the cause of death, or to hire an independent pathologist; that he failed to elicit testimony from Commonwealth witnesses, from Petitioner himself, or from his witness Larry Cooper with regard to Petitioner's state of intoxication; that he failed to request a jury instruction on the defense of intoxication or, for that matter, any other jury instruction; that he failed to argue for a finding of third degree based on the defense of intoxication and lack of intent; and that he failed to object to prejudicial remarks by the Prosecutor during opening and closing speeches and improper trial tactics by the Prosecutor. He also complained of trial counsel's failure to object to admission of prejudicial evidence at trial. Neither trial counsel nor PCHA counsel preserved the defendant's own objection and motion for a mistrial made when the jury observed the defendant in prison garb.

It is respectfully submitted that the trial court did not apply standards which meet the tests set forth in *Strickland* and *Cronic*. The trial court quoted the test as follows:

> "It must be noted at the outset that the test for competency is not whether other alternatives were more reasonable, employing a hindsight evaluation of the record, but whether the attorney's assessment of the case and his advice were reasonable. *Commonwealth v. Tripplett*, 381 A.2d 877 (Pa. 1977). An attorney's assistance is effective once it can be concluded that the particular course chosen by the attorney had some reasonable basis designed to effectuate his client's interests. *Commonwealth v. Bethea*, 243 Pa. Super. 494, 366 A.2d 262 (1977). In order to prove ineffective assistance of counsel, a defendant must prove that his attorney did not inform him of his rights, that the attorney's action had no reasonable basis designed to effectuate his client's interests, and that had the attorney so informed him, the defendant's potential for success would have been substantially greater. *Commonwealth v. Nagel*, 246 Pa. Super. 576, 371 A.2d 83 (1977)." App. D, page A14, *infra*.

Not only did the trial judge improperly apply his announced standard, but that standard is not as demanding as the one announced by this Court.

Furthermore, the Superior Court in its opinion did not describe any standards by which to test the conduct of the trial counsel; it merely concluded that neither the defense of drowning nor the defense of intoxication were viable in the case at bar. It did not attempt to discuss any of the other deficiencies charged to trial counsel. As a matter of fact, the trial court refused to consider trial errors, since counsel had only filed "boilerplate" motions. The trial court thus misinterpreted the appropriate rule of criminal procedure which requires the filing of post-verdict motions within ten days, and which permits con-

sideration of only those grounds which were raised in pre-trial proceedings or at trial. However, it does not prohibit setting forth additional reasons in support of the post-trial motions after motions have been timely filed. See Pa.R.Crim.P. 1123(a). Certainly, if trial counsel had failed in his duty to raise the important issues, then this would clearly establish trial counsel's ineffectiveness.

The Superior Court did not address this issue at all in its Opinion.

The Superior Court was wrong in concluding that the defense of drowning was not viable. The Court cited three cases standing for the proposition that Petitioner could have been guilty of murder even if he had not struck the fatal blow. However, in those three cases the defendants were convicted of murder of a lesser degree than first degree. In *Commonwealth v. Mobley,* 467 Pa. 460, 359 A.2d 367 (1976), defendant had been convicted of third degree; in *Commonwealth v. Vaughn,* 459 Pa. 35, 326 A.2d 393 (1974) defendant had been convicted of second degree under the former Pennsylvania statute (which is the equivalent of third degree under the present Crimes Code); and in *Commonwealth v. Wilson,* 449 Pa. 235, 296 A.2d 719 (1972) defendant's conviction for voluntary manslaughter was reversed because of lack of evidence of his shared intent.

On the other hand, in the case at bar, Petitioner was charged with first degree murder. The prosecution proceeded on the theory that Petitioner was one of the three males who beat Tierney over the head and stabbed him with kitchen knives and forks. Petitioner admitted being present, but testified that Tierney was alive when he was placed in the trunk of the car. Even Larry Cooper, who admitted to the murder, testified that Tierney was alive when Cooper drove the car away.

No Pennsylvania case has been cited by either the trial court or the Superior Court for the proposition that a person can be guilty of first degree murder through vicarious responsibility as an accomplice, aider and abet-

ter, or co-conspirator. Most important, the jury was not properly charged on such a theory. But the significance to the instant Petition is that trial counsel never fully investigated the facts, never fully cross-examined the witnesses, and never argued to the trial court in post-verdict motions, on this highly critical theory. This failure constitutes an abdication of the duties enumerated by this Court in *Strickland*, including the duty to investigate a plausible line of defense, the duty to advocate the defendant's cause, and the more particular duty to consult with the defendant on important decisions.

Similarly, the defense of intoxication may negate the intent necessary to find first degree murder. The Superior Court recognized this, citing in its footnote 4 the applicable statute (18 Pa.C.S.A. §308), *Commonwealth v. Davenport*, 494 Pa. 532, 431 A.2d 982 (1981), and *Commonwealth v. Bailey*, 480 Pa. 329, 390 A.2d 166 (1978). This statute and these cases make clear that intoxication may, by eliminating specific intent, reduce a charge of first degree murder to third degree, and that counsel's failure to pursue the defense may render him ineffective. In *Bailey, supra*, the Supreme Court reversed a first degree murder conviction because counsel failed to pursue the defense of intoxication, since the defendant would have had nothing to lose by pursuing it in that case. In *Davenport, supra*, the Supreme Court refused to reverse a first degree conviction based on a robbery death because it was a strategic decision whether to seek acquittal or to utilize the defense of intoxication merely to mitigate the charge.

In the case at bar, Petitioner would have had nothing to lose by pursuing the defense of intoxication. There was ample evidence that he was present at the time the victim was beaten and placed in the trunk of the car; there was ample evidence that he participated in the event. He himself testified that he was present; he tried to minimize his participation and knowledge. His co-defendant, Larry Cooper, who had pleaded guilty and

been sentenced to life imprisonment for the murder, voluntarily testified on his behalf, stating that Petitioner played a minor role and had not conspired or pre-planned the death of the victim. Thus, failure of the trial counsel to pursue this line could not have been a strategic decision. Yet the Superior Court refused to consider it because the PCHA counsel failed to develop from trial counsel at the PCHA hearing any testimony showing that prior counsel had no reasonable basis for his actions. App. B, *infra*, p.A.7. If this is so, then both court-appointed trial counsel and court-appointed PCHA counsel were ineffective under the *Strickland* standards.

Even on the issue of the jury observing the Petitioner in prison garb, neither trial counsel nor PCHA counsel pursued this. The Pennsylvania appellate cases make clear that where jurors accidentally observe a defendant in prison garb or shackles, it is not automatically grounds for a mistrial without more; however, cautionary instructions should be given. See *Commonwealth v. Wharton*, 250 Pa. Super. 25, 378 A.2d 434 (1977), citing *Commonwealth v. Evans*, 465 Pa. 12, 348 A.2d 92 (1975), and *Commonwealth v. McMonigle*, 228 Pa. Super, 345, 323 A.2d 733 (1974). Also see *Commonwealth v. LeCuyer*, 290 Pa. Super. 518, 434 A.2d 1264 (1981), *Commonwealth v. Smith*, 263 Pa. Super. 94, 397 A.2d 12 (1979); *Commonwealth v. Carter*, 219 Pa. Super. 280, 281 A.2d 75 (1971).

In the instant case, neither trial counsel nor PCHA counsel pursued the issue, and neither the trial court nor the Superior Court considered it in applying the standard for effective representation. This does not comport with the *Strickland* requirements.

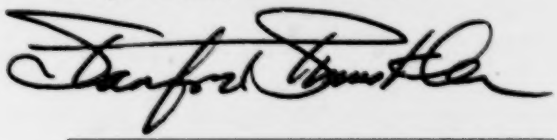
It is too clear for extended argument that if the jury believed: that Tierney was still alive when he was placed in the trunk of the car; that the car was driven away by Cooper; that Petitioner had not pre-planned these events or contemplated Cooper throwing Tierney into the water, thus causing his death by drowning, but merely expected

Cooper to drop Tierney off at a lot (as Cooper testified); then there is surely a reasonable probability that the result of the proceeding would have been different. Similarly, if the jury believed that Petitioner was too intoxicated to form any specific intent to kill Tierney or to conspire to kill him, then likewise there is a reasonable probability that the result of the proceeding would have been different. Accordingly, this meets the second requirement of *Strickland*.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted to determine whether the Pennsylvania Courts have ignored or improperly interpreted the Sixth Amendment guarantee of effective assistance of counsel, as recently interpreted by this Court.

Respectfully submitted,



STANFORD SHMUKLER, ESQUIRE
Attorney for Petitioner
George E. Austin

SEPTEMBER 30, 1984

APPENDIX A

July 3, 1984

Mark E. Kogan, Esq.
Suite 2200
1616 Walnut Street
Philadelphia, Pa. 19103

Re: *George E. Austin, Petitioner v. Commonwealth*
No. 208 E.D. Allocatur Docket 1984

Dear Mr. Kogan:

This is to advise you that the following order has been endorsed on the Petition for Allowance of Appeal filed in the above-captioned matter:

July 2, 1984
Petition for Allowance of Appeal denied.
P.C.

Very truly yours.

_____

Patrick Tassos
Deputy Prothonotary

PD:ejh
cc: Robert B. Lawler, Esq.

APPENDIX B

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
	:	No. 494 Philadelphia 1982
GEORGE E. AUSTIN, *Appellant*	:	

JUDGMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the Court of Common Pleas of PHILADELPHIA County be, and the same is hereby AFFIRMED.

BY THE COURT:

_____

J. Haniel Henry
Prothonotary

Dated: March 16, 1984

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
	:	No. 494 Philadelphia 1982
GEORGE E. AUSTIN, *Appellant*	:	

Appeal from the Judgment of Sentence of the Court of Common Pleas, Criminal Division, of Philadelphia County at No. 81-05-579-582.

Before: SPAETH, *P.J.* MONTEMURO and POPOVICH, *JJ.*

PER CURIAM:

Judgment of sentence affirmed.

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
	:	No. 494 Philadelphia 1982
GEORGE E. AUSTIN, *Appellant*	:	

Appeal from the Judgment of Sentence of the Court of Common Pleas, Criminal Division, of Philadelphia County at No. 81-05-579-582.

Before: SPAETH, *P.J.*, MONTEMURO and POPOVICH, *JJ.*

MEMORANDUM OPINION

On August 7, 1981, a jury found appellant guilty of first degree murder[1] and conspiracy to commit murder.[2] Post-trial motions were filed and denied. Thereafter, appellant filed a *pro se* petition for post-conviction relief in which he alleged the ineffectiveness of trial counsel. New counsel was appointed and a hearing was held on the ineffectiveness claims. The trial court denied the petition for post-conviction relief and sentenced appellant to life imprisonment for murder and a consecutive term of five to ten years for conspiracy. This appeal followed. We affirm.

Appellant raises several questions on this appeal. They include:

1. Was trial counsel constitutionally ineffective for failing to pursue the issue of causation?

2. Was trial counsel constitutionally ineffective for failing to pursue the defense of intoxication?

3. Was trial counsel constitutionally ineffective for failing to request a mistrial or object to numerous

1. 18 Pa.C.S.A. §2502(a).
2. 18 Pa.C.S.A. §903.

improper statements by the prosecutor and improper admissions of prejudicial evidence?

4. Was trial counsel constitutionally ineffective for failing to file adequate post-trial motions in order to preserve issues for appeal?

Section 9543 of the Post-Conviction Hearing Act[3] requires that a petitioner must not only be convicted, but must also be sentenced before becoming eligible for relief under the Act. It is apparent, therefore, that the petition for post-conviction relief denied by the court below, from which the ineffectiveness issues raised herein arise, was filed prematurely. Nevertheless, because the lower court held a PCHA hearing on the merits of appellant's allegations of ineffective assistance of counsel, and because appellant has since been sentenced by the trial court, we find it in the interest of justice and judicial economy to ignore this procedural defect.

The facts of this case, as summarized by the court below, are as follows:

> The defendant, George E. Austin, was arrested for the September 26, 1980, murder of Edward Tierney. This arose out of an incident which occurred at the home of Theresa Nunez located at 4105 Orchard Street in the City of Philadelphia. On the morning of the incident, September 26, 1980, at about 4:30 A.M. the defendant and two other viciously beat Edward Tierney. Mr. Tierney was, at that point in time, attending the Philadelphia Police Academy.
>
> The purpose of Mr. Tierney's presence at 4105 Orchard Street has never been determined, however, several witnesses testified to the gruesome attack on Mr. Tierney. Mr. Tierney was beaten with kitchen instruments, including forks, knives, pots and pans.

3. 42 Pa.C.S.A. §9541 *et seq.*

While he attempted to ward off this attack he unsuccessfully pleaded for others in the house to help him, exclaiming that he was a police officer.

At some point in time the police were summoned by neighbors who heard a commotion at the residence.

The three men dragged Mr. Tierney to the second floor and continued the beating. They tied a cord around his neck and hands and put him in the bathtub.

Upon the police arrival to investigate, the owner, Ms. Theresa Nunez, explained to the police that it was merely a domestic argument. Whereupon the police left.

At that point the defendant and the two others dragged Mr. Tierney out to Mr. Tierney's car and struggled to force Mr. Tierney into the trunk of the car. In an attempt to escape, Mr. Tierney continued to call out for help in vain. The defendant repeatedly struck Mr. Tierney in the head and body with a ball peen hammer in an effort to close the trunk with Mr. Tierney inside. Finally, these people jumped on top of the trunk and managed to close it.

Some time during the struggle Mr. Tierney's watch and wallet were removed.

One of defendant's cohorts proceeded to drive Mr. Tierney's car away from the scene with Mr. Tierney, badly beaten, tied up, and still alive, in the trunk.

That was the last time Mr. Tierney was seen alive. The next day his body was recovered from Frankford Creek.

(Lower Court Opinion, October 1, 1982, pp. 1-3).

Appellant's first allegation of ineffectiveness is that trial counsel failed to argue that the cause of Mr. Tierney's death was drowning, which could not be attributed to the direct actions or proven intentions of appellant. Appellant asserts that there was, at most, a conspiracy to commit serious bodily injury, thereby reducing the crime to murder in the third degree.

This argument is meritless. A review of the trial transcript reveals that trial counsel did argue to the jury the same theory which appellant claims his counsel did not pursue. *See* (Notes of Testimony, August 4, 1981, p. 621); (Notes of Testimony, August 6, 1981, pp. 918-922, 925-928). "It is not necessary for one to strike the fatal blow in order to be guilty of murder." *Commonwealth v. Mobley*, 467 Pa. 460, ____ 359 A.2d 367, 369 (1976). *See also, Commonwealth v. Vaughn*, 459 Pa. 35, 326 A.2d 393 (1974); *Commonwealth v. Wilson*, 449 Pa. 235, 296 A.2d 719 (1972). Here, the jury found from the facts the element of a shared criminal intent, which is all that was necessary to find appellant guilty as an accomplice in the murder of Edward Tierney.

Appellant's next contention is that "TRIAL COUNSEL DID NOT HAVE A REASONABLE BASIS DESIGNED TO EFFECTUATE APPELLANT'S INTEREST BY NOT PURSUING THE DEFENSE OF INTOXICATION." (Brief for Appellant at p. 12).[4] It does

---

4. The applicable criminal statute, 18 Pa.C.S.A. §308, provides:

"§308. Intoxication or drugged condition

Neither voluntary intoxication nor voluntary drugged condition is a defense to a criminal charge, nor may evidence of such conditions be introduced to negative the element of intent of the offense, except that evidence of such intoxication or drugged condition of the defendant may be offered by the defendant whenever it is relevant to reduce murder from a higher degree to a lower degree of murder."

The briefs submitted by both appellant's appellate counsel and the Commonwealth (Brief for Appellee at p. 7, n. 4) incorrectly use the word "defense" in association with the issue of intoxication. As indicated by Section 308, a proper statement of the issue raised is

not appear that trial counsel, who testified at the PCHA hearing below, was questioned about his decision not to pursue the issue of intoxication. The Commonwealth argues that appellant has, therefore, failed to meet his burden of proof on this claim of ineffectiveness. We agree. A reading of the PCHA hearing transcript reveals that appellant did not pursue either the issue of intoxication or the allegations of trial counsel's ineffectiveness regarding improper statements made by the prosecutor and the admission of prejudicial evidence. Although trial counsel was asked, at the PCHA hearing, if he had filed supplemental post-trial motions after the trial transcript had been prepared, appellant did not take the opportunity to raise all of the issues which he felt should have been included in post-trial motions. Where PCHA counsel argues that prior counsel was incompetent in the manner in which he conducted the trial but fails to offer to the PCHA hearing judge any evidence that prior counsel had no reasonable basis for his actions, the record then is bereft of any basis upon which relief may be granted. *See Commonwealth v. Bowers*, 245 Pa.Super. 214, 369 A.2d 370, 375 (1976).

Accordingly, judgment of sentence is affirmed.

---

that trial counsel was ineffective for failing to argue that, by reason of intoxication, appellant lacked the specific intent to kill, a necessary element of first degree murder. *See Commonwealth v. Davenport*, 494 Pa. 532, 431 A.2d 982 (1981);. *Commonwealth v. Bailey*, 480 Pa. 329, 390 A.2d 166 (1978).

APPENDIX C

IN THE COURT OF COMMON PLEAS
OF PHILADELPHIA COUNTY
TRIAL DIVISION CRIMINAL SECTION

COMMONWEALTH OF PENNSYLVANIA	:	
v.	:	MAY TERM, 1981
GEORGE E. AUSTIN,	:	
	:	Nos. 579-582

OPINION

SABO, *J.* October 1, 1982

FACTS:

The defendant, George E. Austin, was arrested for the September 26, 1980, murder of Edward Tierney. This arose out of an incident which occurred at the home of Theresa Nunez located at 4105 Orchard Street in the City of Philadelphia. On the morning of the incident, September 26, 1980, at about 4:30 A. M. the defendant and two others viciously beat Edward Tierney. Mr. Tierney was, at that point in time, attending the Philadelphia Police Academy.

The purpose of Mr. Tierney's presence at 4105 Orchard Street has never been determined, however, several witnesses testified to the gruesome attack on Mr. Tierney. Mr. Tierney was beaten with kitchen instruments, including forks, knives, pots and pans. While he attempted to ward off this attack he unsuccessfully pleaded for others in the house to help him, exclaiming that he was a police officer.

At some point in time the police were summoned by neighbors who heard a commotion at the residence.

The three men dragged Mr. Tierney to the second floor and continued the beating. They tied a cord around his neck and hands and put him in the bathtub.

Upon the police arrival to investigate, the owner, Ms. Theresa Nunez, explained to the police that it was merely a domestic argument. Whereupon the police left.

At that point the defendant and the two others dragged Mr. Tierney out to Mr. Tierney's car and struggled to force Mr. Tierney into the trunk of the car. In an attempt to escape, Mr. Tierney continued to call out for help in vain. The defendant repeatedly struck Mr. Tierney in the head and body with a ball peen hammer in an effort to close the trunk with Mr. Tierney inside. Finally, these people jumped on top of the trunk and managed to close it.

Some time during the struggle Mr. Tierney's watch and wallet were removed.

One of the defendant's cohorts proceeded to drive Mr. Tierney's car away from the scene with Mr. Tierney, badly beaten, tied up, and still alive, in the trunk.

That was the last time Mr. Tierney was seen alive. The next day his body was recovered from the Frankford Creek.

The defendant, Mr. Austin, was arrested on March 19, 1981, in Florida and charged under May Term, 1981: #579 Criminal Conspiracy; #580 Possession Instrument of Crime, Generally, Possession Instrument of Crime, Concealed Weapon-Prohibited Offensive Weapon; #581 Involuntary Manslaughter; #582 Murder, Voluntary Manslaughter.

On May 5, 1981, reduction of bail was denied by the Hon. Paul Ribner.

On July 16, 1981, defendant's request for new counsel was denied by the Hon. Paul Ribner.

On August 4, 1981, a jury having been duly empaneled, was sworn and affirmed and the trial proceeded.

On August 7, 1981, after due deliberation, the jury returned with a verdict of guilty on Bill May Term, 1981, #582, First Degree Murder; #579, Criminal Conspiracy. Sentence was deferred pending Post-Trial Motions. Neuropsychiatric examination was ordered.

On August 17, 1981, the defendant's Motions for a New Trial and in Arrest of Judgment were filed.

On September 21, 1981, after argument, post-verdict motions were denied. Sentence was deferred pending appointment of new counsel for defendant to file for ineffective assistance of counsel.

On February 2, 1982, after a hearing, the defendant's motion for ineffective assistance of counsel was denied and defendant was sentenced: on #582, life imprisonment in the State Correctional Institution at Graterford; #579, not less than five (5) years nor more than ten (10) years in the State Correctional Institution at Graterford, to be served consecutively to the sentence under #582. The Court also assessed against the defendant $10.00 to the Victim's Compensation Fund.

On February 16, 1982, Notice of Appeal to the Superior Court of Pennsylvania was filed.

DISCUSSION:

Defendant's allegations of error points 1, 2, 3, 4 in his Motion in Arrest of Judgment and/or For a New Trial are of the "boilerplate" variety. They do not sufficiently inform this Court of the grounds on which the defendant seeks an arrest of judgment or a new trial; therefore, these points are not properly preserved. *Commonwealth v. Twiggs,* 1485 Pa. 481, 402 A.2d 1374 (1979); *Commonwealth v. Waters,* 474 Pa. 430, 384 A.2d 234 (1978); *Commonwealth v. Blair,* 460 Pa. 31, 331 A.2d 213 (1978).

During arguments on the Post-Trial Motions, defense counsel raised only the issue of the credibility of witnesses, noting in particular that what one witness testified to would have been impossible for her to see. (N. T. 3-4, 9-21-81).

Inconsistencies and contradictions which may exist in the testimony of various witnesses are for the jury to sift through and then decide who they wish to believe or not believe. That a mere conflict exists in the testimony is not enough to condemn it, provided that out of all of it, the facts relied upon emerged with reasonable distinctness and certainty. Here, such is the case. *Commonwealth v. Pierce,* 446 Pa. 479, 288 A.2d 807 (1972). The jury may believe all, a part, or none of the testimony of any witness for the Commonwealth or defense, *Commonweraith v. Duncan,* 473 Pa. 264, 344 A.2d 824 (1975); *Commonwealth v. Thomas,* 448 Pa. 42, 292 A.2d 352 (1972).

In reviewing the evidence in support of the above conviction, it must be viewed in the light most favorable to the verdict winner. *Commonwealth v. Gallo,* 473 Pa. 186, 373 A.2d 1109 (1977). The Commonwealth is entitled to every inference reasonably arising from the evidence. *Commonwealth v. Ford,* 472 Pa. 542, 372 A.2d 821 (1977). If the evidence is believed and either by direct or inferential proof provides a basis upon which the fact finder can base its verdict, then the test for

sufficiency is met. *Commonwealth v. Peterson*, 251 Pa. Super. 462, 380 A.2d 872 (1977).

It is of obvious import that the jury in the instant case did properly exercise their above-discussed function in sifting through the alleged inconsistencies and contradictions and did arrive at a legally justified conclusion.

For these reasons, the defendant's post-trial motion is denied.

It should be noted that during the argument for post-trial motions, the defendant handed up a motion alleging ineffective assistance of counsel. Sentencing was delayed to allow for new counsel to be appointed. Subsequently, the motion for ineffective assistance of counsel was heard before the Hon. Albert F. Sabo, and denied.

BY THE COURT:

_____

APPENDIX D

IN THE COURT OF COMMON PLEAS
OF PHILADELPHIA COUNTY
TRIAL DIVISION CRIMINAL SECTION

COMMONWEALTH OF PENNSYLVANIA	:	
v.	:	MAY TERM, 1981
GEORGE E. AUSTIN,	:	
	:	Nos. 579-582

SUPPLEMENTAL OPINION

SABO, *J.* October 6, 1982

FACTS:

The following Motion was submitted to the Court September 21, 1981, in the nature of a P.C.H.A. by defendant, Gerorge Austin, pro se.

The P.C.H.A. hearing was held on February 2, 1982. Defendant was represented by Mark E. Kogan, Esq. who replaced Ben Joseph, Esq.

This case involved the gruesome beating and drowning death of Edward Tierney, on September 26, 1980. Mr. Tierney had been attending the Philadelphia Police Academy.

Mr. Austin was tried for the death of Mr. Tierney and found guilty by a jury on August 7, 1981.

The jury fixed the penalty at life imprisonment.

Post-trial motions were filed and subsequently argued on September 21, 1981. Upon denial of same, the Court deferred sentencing pending appointment of new counsel for defendant, who handed up a motion on that day alleging ineffective assistance of counsel.,

Arguments were heard at a P.C.H.A. Hearing regarding the allegations of ineffective assistance of counsel at trial. Upon denial of same, the Court sentenced the defendant on Bill May Term, 1981, No. 582 to life

imprisonment in the State Correctional Institution at Graterford; #579, not less than five (5) years nor more than ten (10) years in the State Correctional Institution at Graterford, to be served consecutively to the sentence under #582. The Court also assessed against the defendant $10.00 to the Victim's Compensation Fund.

On February 16, 1982, Notice of Appeal to the Superior Court of Pennsylvania was filed.

The main issues raised by new counsel at the P.C.H.A. hearing were four-fold: Mr. Joseph's judgment in not moving to suppress any evidence; in rejecting an offered plea bargain; in his tactical defense of Mr. Austin; and in calling a co-defendant to testify at trial.

It must be noted at the outset that the test for competency is not whether other alternatives were more reasonable, employing a hindsight evaluation of the record, but whether the attorney's assessment of the case and his advice were reasonable. *Commonwealth v. Tripplett,* 381 A.2d 877 (Pa. 1977). An attorney's assistance is effective once it can be concluded that the particular course chosen by the attorney had some reasonable basis designed to effectuate his client's interests. *Commonwealth v. Bethea,* 243 Pa. Super. 494, 366 A.2d 262 (1977). In order to prove ineffective assistance of counsel, a defendant must prove that his attorney did not inform him of his rights, that the attorney's action had no reasonable basis designed to effectuate his client's interests, and that had the attorney so informed him, the defendant's potential for success would have been substantially greater. *Commonwealth v. Nagel,* 246 Pa. Super. 576, 371 A.2d 983 (1977).

In all four instances the defendant failed to meet the burden of demonstrating that counsel performed or failed to perform some act and that such actions had no reasonable basis.

Specifically, regarding the suppression of evidence, original counsel, Mr. Joseph, discussed this issue at length with defendant in an effort to explain the circum-

stances under which evidence can be suppressed and what course they should take. (N.T. 10, P.C.H.A. Hearing; 2-2-82). In so doing, the attorney fulfilled his obligation to defendant.

Also, there have been insinuations that there was much hostility on the part of the defendant toward Mr. Joseph. This was explained by Mr. Joseph as emanating from Mr. Austin's vehement refusal to entertain a plea bargain offered by the District Attorney. Mr. Joseph also stated that he informed Mr. Austin of his right not to plead guilty and accepted his decision not to do so. (N.T. 12, P.C.H.A. Hearing; 2-2-82). In fact, no plea bargain was accepted in this case.

At the P.C.H.A. Hearing, newly appointed counsel, Mr. Kogan, raised questions concerning the tactical defense offered by Mr. Joseph. (N.T. 14-15, P.C.H.A. Hearing; 2-2-82). In an evaluation of this allegation we must look to the "reasonableness" of Mr. Joseph's course of action. Effective assistance of counsel cannot be determined by the success or failure of any particular tactic, but rather by its *reasonableness*. *Commonwealth v. Tripplett*, supra. Upon reviewing the record, this Court finds Mr. Joseph's defense not merely reasonable but proper and appropriate under the circumstances.

Finally, allegations were set forth regarding the prudence of allowing defendant's co-defendant, Mr. Cooper, to testify at trial. As was stated by Mr. Joseph, the decision to call Mr. Cooper was Mr. Austin's alone. Mr. Joseph advised Austin against such a move in vain. (N.T. 20, P.C.H.A. Hearing; 2-2-82).

After careful consideration of all the efforts made by Mr. Joseph under the circumstances, this Court found Mr. Joseph was not ineffective, and denied the motion.

BY THE COURT:

_____

APPENDIX E

SUPREME COURT OF THE UNITED STATES

No. A-124

GEORGE E. AUSTIN,

Petitioner,

v.

PENNSYLVANIA

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including September 30, 1984.

/s/ William J. Brennan, Jr.

Associate Justice of the Supreme Court of the United States

Dated this 27th
day of August, 1984.